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IN THE

Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Petitioners,

v.

HARRY W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *iii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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2001 California Preliminary P&C Market Share Report located at the California Department of Insurance Website at http://www.insurance.ca.gov/RRD/RSU/MktShr2001/MktShr2001.htm 8

In opposing the petition for writ of certiorari of the Gerling Petitioners, the Respondent asks the Court to ignore the record, ignore the language of the California statute at issue, and ignore the legislative history of that statute. As he did in the courts below, the Respondent has recast the HVIRA as a benign "reporting statute"; a "state regulation of in-state insurance companies." Opp. to Gerling at 14.[1] In reality, as applied to the Gerling Petitioners, the HVIRA *exclusively* seeks information maintained by out-of-state companies regarding out-of-state transactions entered into by out-of-state parties. The Respondent's post-litigation recharacterization of the HVIRA can neither be reconciled with the legislation itself nor with his own pre-litigation conduct.

The Gerling Petitioners are North American insurers and reinsurers, none of which issued a single insurance policy in Europe prior to 1945. ER 616. The district court has concluded that the Gerling Petitioners do not have "possession, custody or control" of the information demanded by the HVIRA. App., *infra*, 47a. Nevertheless, the Ninth Circuit has, through its decisions, authorized the Respondent to suspend the Gerling Petitioners' long-existing California licenses for their failure to do the impossible.

A. The HVIRA Violates Due Process Limitations On State Power

The HVIRA represents an attempt by the State of California to project its regulatory regime far beyond its borders. In its application, the HVIRA constitutes a thinly-veiled attempt to supplant the controlling law of other jurisdictions. The record is clear, there is simply no way for the Gerling Petitioners to

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1. References to the Respondent's Brief in Opposition to the Petition for a Writ of Certiorari of the Gerling Petitioners and to the AIA's Petition for a Writ of Certiorari will be referred to as "Opp. to Gerling" and "Opp. to AIA", respectively. References to the Appendix ("App.") and Lodging ("Lodg.") are to those filed in conjunction with the Petition for Writ of Certiorari of the Gerling Petitioners.

comply with the HVIRA unless their German affiliates violate German law. The Constitution clearly does not afford the states such unbridled authority.

1. The HVIRA Constitutes Impermissible Extra-territorial Legislation

The Respondent's primary defense to the constitutionality of the HVIRA is his claim that "the HVIRA is a reporting statute that only seeks information about business practices of companies doing business in California and their affiliates." Opp. to Gerling at 18.[2] This post-litigation justification conflicts sharply with the rationale that the Respondent offered the California legislature prior to enactment: "[t]he Department [of Insurance] believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants." Reply App.[3], *infra*, 5a. The Respondent's current argument also conflicts with the language of the HVIRA itself; a statute which demands production of information regarding all insurance policies issued in Europe between 1920 and 1945. Cal. Ins. Code § 13804(a).

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2. The statutes the Respondent attempts to analogize do not support his assertion that states routinely require the type of information demanded by the HVIRA. Opp. to Gerling at 27; Opp. to AIA at 6. Contrary to the Commissioner's selective representations, ***all*** of those statutes require information from foreign companies *under the control* of California insurance companies or where there is a significant nexus between the California company and its foreign affiliate. *See* Cal. Ins. Code §§ 699.5, 717, 1215-1215.16; Cal. Fin. Code §§ 5800-5811, 10000-10009. In contrast, the HVIRA requires California insurers to obtain (and disclose) European insurance information from distant "related" companies over which they have no control and which may not even be in the same corporate "family." Cal. Ins. Code § 13802(b).

3. References to "Reply App." are to the documents appended to the Gerling Petitioners' Reply Brief.

Apparently unable or unwilling to defend the statute as enacted by the California legislature, the Respondent offers the Court (as he did the Ninth Circuit) a distorted version of the record. For example, he claims that the issue of whether the Gerling Petitioners have "'control' of the information sought and whether foreign law bars disclosure is disputed." Opp. to Gerling at 27. In fact, the district court already concluded that the Gerling Petitioners do not have control over the information required by the HVIRA.[4] App., *infra*, 47a. Similarly, the German government has repeatedly concluded that "compliance by German companies with the HVIRA would cause them to violate German laws and thereby become subject to civil and criminal penalties." Dec. 12, 2002 *Amicus* brf. of FRG at 4.[5]

Particularly revealing is the Respondent's inexplicable criticism of the Gerling Petitioners' "elaborate citations to the record." Opp. to Gerling at 24, n.16. This comment betrays the Respondent's clear insecurity with the record.[6] He simply cannot defend either the statute as written or the record developed below.

To support his new characterization of the HVIRA, Respondent takes extraordinary liberties in providing the Court with a revisionist history of the origins and purpose of the statute

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4. The district court in *Gerling Global Reinsurance Corp. of America, et al. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) made an identical factual determination.

5. *See also* ER 846; SER 1248; Mar. 15, 2002 *Amicus* brf. of FRG at 6; Aug. 5, 2002 *Amicus* brf. of FRG at 9-10.

6. The record could not be more clear that the State of California views the HVIRA as a tool to effect the conduct of European insurers. *See, e.g.*, ER 1111 (Department of Insurance senior counsel stated that HVIRA "clearly goes beyond the California licensed company."); ER 1113-1115 (Respondent demanded that representatives of German companies with no U.S. presence be made available to discuss compliance with HVIRA); SER 901-908 (California Treasurer issued a written demand to a German affiliate of the Gerling Petitioners that it should comply with HVIRA to "eliminate" litigation).

(legislation which he actively supported). Specifically, the Respondent now seeks to distance the HVIRA from its companion statute which purports to empower California courts to entertain Holocaust-related litigation. Cal. Civ. Pro. Code § 354.5.

In fact, the Respondent is fully aware that these provisions were included in the same legislation as the HVIRA. AB 600 (the "Knox Bill") Lodg., *infra*, L-36-L-41. According to the California legislature, "[t]he author introduced this bill in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." Reply App., *infra*, 4a.

The Knox Bill (and the resulting HVIRA) has nothing to do with an insurance company's fitness to write insurance in California. Nowhere in the Knox Bill's legislative history does the legislature even suggest an intent to "inform[] California's residents about the character of the family of companies from which they might purchase insurance." Opp. to Gerling at 6.

The HVIRA had a single purpose from the start: the payment of European insurance claims pursuant to California-imposed standards.[7] It attempts to effect conduct far beyond the borders of the state. As such, it constitutes impermissible extraterritorial legislation.

2. The Ninth Circuit's Decision Directly Conflicts With The Eleventh Circuit's Decision in *Gallagher*

In attempting to distinguish the Eleventh Circuit's decision in *Gallagher*, the Respondent relies heavily on purported differences between the HVIRA and the Florida Holocaust statute. These distinctions are illusory. Aside from the fact that

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7. The California Senate Floor Analysis of the Knox Bill contains a nine paragraph summary of this legislation. Paragraph eight of this document affirmatively states that the bill "[w]ould authorize legal actions on Holocaust insurance claims arising out of insurance policies purchased or in effect in Europe before 1945." Reply App., *infra*, 4a.

there is a counterpart in the Knox Bill for virtually every provision contained in the Florida statute, the Eleventh Circuit specifically stated that it was dealing *solely* with the reporting provisions of the Florida statute. *Gallagher*, 267 F.3d at 1234. Thus, the statutory provisions reviewed by the Eleventh Circuit are virtually identical to those contained in the HVIRA.

The Respondent attempts to distinguish *Gallagher* by arguing that the Florida Commissioner tried to enforce the Florida statute against European insurers by issuing subpoenas to the Gerling Petitioners. The Respondent argues that these subpoenas represented an attempt by Florida "to enforce its law against European insurers . . . whereas California's law is addressed only to California-licensed companies." Opp. to Gerling 23. However, the HVIRA is little more than the functional equivalent of the Florida subpoenas. To paraphrase the Respondent, the HVIRA (like the Florida subpoenas) is only "nominally directed" to California companies. By its very terms, the HVIRA (like the subpoenas) defines California insurers "as *including* foreign affiliates." Cal. Ins. Code § 13802(b). Like the Florida subpoenas, the HVIRA commands "foreign affiliates to provide the records" it seeks. Opp. to Gerling 23-34. California attempts to accomplish by statute that which Florida sought by subpoena – the regulation of companies and transactions with no connection to the state.

The Respondent also claims that the Florida statute was different because it intended to compel payment of claims and created private rights of action against Florida insurers. In fact, the Eleventh Circuit dealt *solely* with the reporting provisions of the Florida statute. Therefore, the statutory provisions that the court struck down in *Gallagher* are identical to the HVIRA. *Gallagher*, 267 F.3d at 1234. Moreover, the legislation creating the HVIRA is in all material respects identical to the Florida statute. Lodg., *infra*, L-29-L-35.

Finally, the Respondent claims that the California and Florida statutes are "supported by materially different state

interests." Opp. to Gerling 24. However, contrary to the Respondent's litigation-manufactured justifications, California enacted the HVIRA for the same reasons Florida did – as part of an attempt to resolve European insurance claims. *See* Cal. Ins. Code §§ 13801(e)-(f); App. 83a; Reply App., *infra*, 4a-5a.

As a result of the conflicting decisions of the Ninth and Eleventh Circuits, the Gerling Petitioners face divergent obligations in Florida and California. This conflict warrants further review by this Court.

3. The HVIRA Denies The Gerling Petitioners Their Right To A Meaningful Hearing

Contrary to the Respondent's assertions, the right to a meaningful hearing implicates *procedural* due process concerns. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (Once it is determined that the interest at stake is a protected property interest, the sole question that remains is what process is due.); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985).[8] "The opportunity to present reasons, . . . why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ.*, 470 U.S. at 546. It is the ability to present reasons why a proposed action should or should not be taken that is key to a meaningful hearing before license suspension. In his opposition, the Respondent never addresses this issue. Instead, he sidesteps it by casting it as a substantive issue – whether the Gerling Petitioners are allowed to even raise any defenses.

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8. The Respondent equates the granting of a license with the suspension of an existing business license. Opp. to Gerling at 29. However, this Court has already recognized that "[t]here is a crucial difference between being deprived of a [right] one has . . . and being denied a constitutional [right] that one desires." *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 5 (1970); *see also Bell v. Burson*, 402 U.S. at 539 ("Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood."). The HVIRA only applies to existing license holders. Cal. Ins. Code §§ 13804(a), 13806.

By mandating license suspension without providing for any type of hearing, the HVIRA violates the Gerling Petitioners' procedural due process rights. Even if afforded a hearing, the Gerling Petitioners will not have the right to demonstrate that they simply cannot comply with the HVIRA's requirements. A hearing with such a predetermined outcome would clearly not satisfy the meaningful hearing requirement embodied in the Due Process Clause.

4. As Applied To The Gerling Petitioners, The HVIRA Does Not Reflect Any Legitimate State Regulatory Interests

In attempting to justify the HVIRA on substantive due process grounds, the Respondent has identified a number of purported state regulatory interests. Opp. to Gerling 6. He claims that these interests provide a "rational basis" for the HVIRA and empower California to legislate away legitimate defenses to compliance. Opp. to Gerling 29. At least as applied to the Gerling Petitioners, none of these purported interests is supported by the record.

For example, the Respondent claims that the HVIRA serves to advance the state's interests by "protecting California residents from insurers that refuse to provide critical information." Opp. to Gerling 6. However, as the district court concluded, the Gerling Petitioners do not have possession of the information demanded by the HVIRA since none of them issued policies in Europe prior to 1945. ER 616. In addition, the district court concluded that the Gerling Petitioners do not have control over the records of their German affiliates. App., *infra*, 47a. Further, these affiliates are prohibited by German law from making the wholesale public disclosure of information required by the HVIRA.

The Respondent further claims that the HVIRA is protecting California residents from companies that refuse to "pay valid insurance claims." Opp. to Gerling 6. Aside from the fact that the Gerling Petitioners did not issue these policies and were

largely founded after the Second World War, there is absolutely no evidence in the record that any company "related" to the Gerling Petitioners refused to pay valid claims under controlling German law. Implicit in the Respondent's current argument is an apparent determination by the State of California in 1999 that German law regarding the payment of Holocaust-era claims is inadequate.

The final purported state interest the Respondent asserts is that the HVIRA informs "California residents about the character of the family of companies from which they might purchase insurance." Opp. to Gerling 6. The Respondent does not attempt to explain what relevance the claims-paying practices of a distant corporate affiliate operating under foreign law has to the "character" of the Gerling Petitioners. Moreover, the scope of information sought by the HVIRA goes far beyond the corporate "family" of the California companies. Cal. Ins. Code § 13802(b).[9]

B. The HVIRA Interferes With Foreign Affairs

The Respondent defends the HVIRA as "a reporting statute that applies only to companies doing business in California." Opp. to Gerling 20. As such, he argues that the HVIRA is "not likely to have adverse effects on U.S. foreign policy."

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9. The Respondent's claims that the HVIRA will ease the burden on the State's fisc rings hollow. First, there is no evidence to support such a claim. Second, aside from the cost to the State in administering the HVIRA, the entire California insurance market, the seventh largest market in the world, would be drastically affected as enforcement would effectively drive all companies related to European insurers out of the State. These companies underwrite at least twenty percent (20%) of all the property and casualty insurance policies issued in California. *See* 2001 California Preliminary P&C Market Share Report located at the California Department of Insurance Website at http://www.insurance.ca.gov/RRD/RSU/MktShr2001/MktShr2001.htm (listing property and casualty market share of the insurance groups which have European affiliates); *see also* ER 223; ER 908; ER 626.

Opp. to Gerling 16. Furthermore, he claims that "the HVIRA does not criticize any foreign government." Opp. to AIA 21.

As justification for enactment of the statute, however, he claims that "[f]or more than 55 years, Holocaust survivors have been stonewalled by insurance companies from which they have sought information." Opp. to Gerling 3. He alleges "decades-long frustration of Holocaust survivors." *Id.* at 5. The Respondent goes on to suggest that he has a better understanding of German law than does the German government. *Id.* at 13.

These justifications conflict sharply with the Respondent's current arguments. They reflect California's apparent dissatisfaction with 55 years of restitution and compensation payments of the Federal Republic of Germany amounting to roughly $100 billion.[10] Dec. 12, 2002 *Amicus* brf. by FRG at 6. They reflect California's disapproval of 55 years of U.S. foreign policy initiatives aimed at "achieving compensation for the victims of Nazism." Dec. 2002 *Amicus* brf. of U.S. at 2. They reflect California's criticism of European (and specifically German) data protection laws which prohibit the unauthorized disclosure of personal information as required by the HVIRA. Dec. 12, 2002 *Amicus* brf. of FRG at 10.

The HVIRA is an attempt by the State of California to impose its own "solution" to Holocaust-era claims despite the Federal Republic of Germany's 55 years of reparations efforts and the recently negotiated Executive Agreement. *See* Cal. Ins. Code §§ 13801(e)-(f); Reply App., *infra*, 1a-5a. The HVIRA is a clear and unmistakable criticism of German domestic law on such issues as data protection, currency valuation, insurance regulation and Holocaust reparations and compensation. In the view of the German government, "[t]he decisions of the Ninth

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10. Which include payment of "over two million claims for assets that could not be returned, including virtually all insurance policies." Dec 12, 2002 *Amicus* brf. of FRG at 6.

Circuit affront German sovereignty every day they remain unreviewed and uncorrected." Dec. 12, 2002 *Amicus* brf. of FRG at 13.

As reflected by the *amicus* filings of the United States, Germany and Switzerland, the HVIRA constitutes impermissible interference with the federal government's conduct of foreign affairs. *Zschernig v. Miller*, 389 U.S. 429 (1968).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — SENATE COMMITTEE ON INSURANCE

SENATE COMMITTEE ON INSURANCE
Senator Jackie Speier, Chair

AB 600 (Knox and Villaraigosa) Hearing Date: June 30,

As Amended: June 17, 1999
Fiscal: Yes
Urgency: Yes

Assembly Insurance Committee - 4/14/99 - (12-0)
Assembly Floor - 6/3/99 - (79-0)

SUMMARY

Would require the Insurance Commissioner to establish and maintain the Holocaust Insurance Registry, would require insurers to provide specified information regarding insurance policies to be included in the registry, would provide public access to the registry in connection with claims litigation, and would provide penalties for an insurers failure to comply with reporting requirements.

DIGEST

Existing law

1. Provides for the Insurance Commissioner's regulation of insurers licensed and transacting the business of insurance in this state.

Appendix

2. Authorizes the Insurance Commissioner to suspend or revoke the certificate of authority of an insure for failure to comply with laws governing insurance regulation in this state.

3. Requires the Department of Insurance to conduct research and investigation into insurance policies, unpaid insurance claims and related matters of victims of the Holocaust.

4. Requires the Insurance Commissioner to suspend the Certificate of Authority of an insurer if the insurer or any affiliate of the insurer has failed to pay any valid claim of Holocaust survivors, until the claim is paid by the insurer or its affiliate.

5. Authorizes legal actions on Holocaust insurance claims arising out of insurance policies issued in Europe between 1920 and 1945.

This bill

1. Would require the Insurance Commissioner to establish and maintain a registry accessible to the public of information related to the insurance policies of Holocaust victims.

2. Would require any insurer doing business in California that sold insurance in Europe that was effected between 1920 and 1945, whether directly or through a related company, to file with the Insurance Commissioner specific information related to the policies sold.

Appendix

3. Would require each insurer subject to the provisions of the bill to certify to the appropriate following facts regarding insurance policies:

   a. That the proceeds of the policies have been paid to the designated beneficiaries or heirs;

   b. That where beneficiaries or heirs could not be located, that the proceeds have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors;

   c. That a court has certified a plan for the distribution of the proceeds; or

   d. That proceeds of a designated amount have not been distributed.

4. Would establish a misdemeanor penalty for an insurer's knowingly false certification.

5. Would establish a civil penalty of up to $5,000 for each instance an insurer knowingly files false information related to the reporting requirements of the bill.

6. Would require the Insurance Commissioner to suspend the certificate of Authority of an insurer that fails to comply with the reporting requirements of the bill by the 210th day after the effective date of the requirements.

Appendix

7. Would require the Insurance Commissioner to adopt emergency regulations to implement the measure within 90 days of the effective date of the bill.

8. Would authorize legal actions on Holocaust insurance claims arising out of insurance policies purchased or in effect in Europe before 1945.

9. Would provide for the adoption of the above provisions on an urgency basis.

COMMENTS

1. *Purpose of the bill.* The author introduced this bill in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims. The bill sets up a registry of information, without which the only remaining evidence of insurance policies purchased prior to the end of W.W.II would be in the hands of the insurance companies or Department of Insurance. The bill will help resolve this outstanding issue by ensuring that any existing information on insurance policies purchased prior to the end of W.W.II will be available to those individuals who need that information in order to protect their rightful claims to reimbursement from insurers.

2. *Background.* The issue of insurance claims for Holocaust survivors came to light in 1997 through a class action suit filed in New York. The problem of unpaid insurance claims had been discovered in the course of researching Holocaust survivor claims to European bank

deposits. DOI estimates there are 50,000 to 100,000 Holocaust survivors in the United States. California has the second largest number, ranging from 6,300 to 19,000. In 1998, two bills were introduced relating to the recovery of proceeds from unpaid Holocaust victim claims. The Governor vetoed AB 1715 (Knox), which contained similar provisions to this bill. The Governor signed SB 1530 (Hayden), Chapter 963, which required the Department of Insurance to develop a plan to investigate and recover unpaid Holocaust victim insurance claims and provided for the suspension of the certificate of authority of insurers failing to pay valid claims.

3. Support. Supporters argue that this bill is an important measure to assist Holocaust survivors and their heirs to obtain their rightful compensation. The Department of Insurance notes that insurance companies, that have for over 50 years refused to pay Jewish and other policyholders, should be held accountable, open their books and pay legitimate claims. The Department believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants. The Consumer Federation of California believes this bill is urgently needed because of the age of the survivors and that justice demands an affirmative duty to resolve this matter in a timely fashion.

   The Los Angeles County Bar Association supports the purposes of the bill, such as providing additional remedies to individuals with unpaid claims, making

information available to claimants, and resolving important questions about past processing of claims. The Association however is concerned about the following "ambiguities and uncertainties": 1) Broad definitions of "related company" and "Holocaust victim" that might impose liability on insurers with no true relationship to the Holocaust, for claims of persons persecuted in areas other than occupied Europe; 2) The filing requirements for policies unrelated to Holocaust victims; and 3) Whether companies can reasonably comply with the reporting requirements.

4. *Opposition.* The Alliance of American Insurers opposes this bill because it places an unfair burden on subsidiary carriers owned by overseas companies and is unnecessary because existing law already created the program to help Holocaust victims.

POSITIONS

Support

Beverly Hills Bar Association
Department of Insurance
California Alliance for Consumer Protection
City Council of the City of West Hollywood
Consumer Federation of California
Jewish Community Relations Committee of the Jewish Federation of Greater Los Angeles (Sponsor)
Jewish Public Affairs Committee of California
Johan Klehs, Chair, State Board of Equalization
Los Angeles County Bar Association (with concerns)
Philip Angelides, State Treasurer

Appendix

Oppose

Alliance of American Insurers

Consultant: Jerry Whitfield